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IN THE

Supreme Court of the United States

October Term, 1957

No. 72

STANISLAW NOWAK,

Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF FOR THIRTY-TWO NATURALIZED CITIZENS *AMICI CURIAE*

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In *Spratt* v. *Spratt*, *supra*, Mr. Chief Justice Marshall ruled: "The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. The judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry; and, like every other judgment, to be complete evidence of its own validity." In *Pintsch Compressing Co.* v. *Bergin*, *supra*, the court, in rejecting a contention seeking to overturn a naturalization judgment, pointed out (at 141) that the challenged qualification had "presumably [been] passed on by the court before it admitted the respondent to citizenship * * *. * * * Whatever may have been the condition under previous statutes, proceedings in a court of record under this legislation are judicial, and result in a judgment which can be impeached only as other judicial judgments may be."

2. *The judgment of naturalization could be attacked and revoked before the lapse of the term of court on the ground of simple fraud or perjury.* *United States* v. *Kornmehl*, 89 Fed. 10 (D. C. N. J. 1898): "The court was deceived, and the letters of naturalization were improvi-

dently issued. They are still within the control of the court, and an order should be entered revoking them, and directing that they be returned to the clerk of the court for cancellation."

3. *The judgment of naturalization could be attacked and revoked after the lapse of the term on the ground that it was void because the naturalizing court had no jurisdiction over the subject matter.* *State ex rel. Bancroft* v. *Stumpf, supra,* at 632: "The proceedings before the justice of peace were void and parole evidence was admissible for the purpose of showing their invalidity. The law of Congress authorized the declaration to be made before the clerk of the court, and he alone has the authority to administer the oath." *People* v. *McGowan, supra*: The court will not consider false declarations to impeach a judgment, but will determine whether the court granting citizenship had statutory jurisdiction.

4. *The naturalization decree could not be attacked on the ground of mere irregularity, the failure to comply with some provision, however basic, or any other defect short of fraud.* Thus, in *Andres* v. *Judge of Circuit Court, supra,* it was held that the fact that the declaration of intention was not sworn to in open court did not operate as a ground to invalidate the decree. In *United States* v. *Norsch, supra,* an attempt was made to invalidate in a federal court a state decree of naturalization on the ground that the witnesses for the applicant for naturalization had never been examined and that no inquiry at all was made into his qualifications. The court ruled that in the absence of a fraud sufficiently grave to impeach a judgment, the bill seeking cancellation of the decree was defective. It stated (at 419): "It will not do, in a bill of this character, to show merely that the judgment assailed is erroneous and ought not to have been entered; neither will it suffice to charge generally that it was fraudulently procured or that the court was imposed upon. A state of facts must be disclosed by the

bill from which the court can see that the conclusions stated by the pleader, to the effect that the judgment was fraudulently procured, etc., are properly drawn." The court concluded that the fact that the decree was erroneous and irregular, in that Congressionally authorized procedures were disregarded, could not be remedied by the bill or the court.

In *State ex rel. Lacy* v. *Brandhorst*, *supra*, the court, relying on *Spratt* v. *Spratt*, ruled that a judgment erroneously naturalizing a minor could not be attacked collaterally after the lapse of the term. "Such naturalization judgment cannot be impeached * * * for mere error or irregularity. * * * The worst that can be said of the judgment that naturalized respondent is that the court giving that decision, 'gave the wrong decision, when it had the power to give the right one.'"

In *Behrensmayer* v. *Kreitz*, *supra*, an attempt was made to annul a naturalization decree on the ground that the naturalized individual was a minor at the time of naturalization. The court ruled (at 630): "We would like to arrive at the conclusion which was reached by the trial court, and thereby prevent Wallace or anyone else from profiting by the fraud which he perpetrated upon the court which made the order admitting him to citizenship, but we cannot consistently do so in the view which we take of the law. The rule is that where a certificate of naturalization is granted by a court of competent jurisdiction, the evidence is not admissible to show that it was improperly granted or was obtained by false and perjured testimony. In *People* v. *McGowan*, *supra*, an appellate court ruled (at 646) that a trial court made no error in excluding evidence of false representation in a naturalization proceeding "upon the principle that such a record, like any other judgment of a court, affords complete evidence of its own validity. In proceedings of naturalization, matters are submitted to the decision of the court, and the presumption will

be indulged the court heard evidence, was satisfied the applicant had complied with the law, and its findings must be held conclusive as to all facts recited in the record."

In *Scott* v. *Strobach, supra*, a collateral attack upon a judgment of naturalization based upon technical grounds was rejected because the judgment was complete evidence of its own validity. The court stated (at 490): "The alien must, and it is intended that he should, confidently rely on [the judgment's] inviolability." Otherwise "its value and dignity is lessened; and that which our statutes and laws teach him to regard as inestimable would degenerate into a fruitful source of vexation and litigation. We must hold the certificate of naturalization free and exempt from all collateral impeachment, no matter though it is inferred that fraud and perjury were involved and committed in its procurement."

5. In order to impeach a judgment of naturalization on the ground of fraud, there must be alleged and proved the kind of fraud which would move a court of equity to invalidate any judgment out of term. See *United States* v. *Norsch, Behrensmayer* v. *Kreitz, People* v. *McGowan, Scott* v. *Strobach, Tinn* v. *United States District Attorney, In re McCoppin*, all *supra*. *There is no case which holds that a mere false statement made in connection with the proceedings themselves is sufficient to obtain equitable relief from a judgment of naturalization.*

The statute thus rests upon and declares a body of decisional law which insists that only extrinsic fraud can vitiate a judgment. There are further reasons arising from the statute itself which support this conclusion.

D. The Scheme and Purpose of the Statute Corroborate the Contention that Findings of Attachment Are *Res Judicata.*

For 104 years prior to 1906, the federal and state courts knew only that an applicant must execute a declaration of intention renouncing prior allegiance; that after five years' residence he might apply for final naturalization provided he had filed his declaration of intention to become a citizen at least two years before the application for final naturalization; that only courts with common law jurisdiction and with both a seal and a clerk enjoyed jurisdiction over naturalization proceedings; that it must appear to the satisfaction of the court that the applicant had resided in the United States for five years, during which time he had behaved as a man of good moral character attached to the principles of the Constitution and well disposed to the good order and happiness of the United States.

Problems of draft evasion, self-expatriation and foreign embarrassments marked the first stirrings of difficulty with the naturalization process. The election frauds of 1868 brought in their wake a host of new difficulties. Thousands of individuals in New York alone received naturalization certificates in the few weeks preceding the election. See *In re Coleman*, Fed. Cas. No. 2980, 15 Blatchf. 406 (C. C. N. Y. 1879); *Commonwealth* v. *Paper*, 1 Brewst. 263 (Phil. 1868). Prior to the passage of the Act of 1906, most of the attempts to redress frauds took a criminal rather than a civil form.*

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* There are references in the legislative history to some 1,916 civil cancellation cases. See *Bindczyck* v. *Finucane*, *supra*. We have been unable to discover any other record of these cases.

The primary concern of the drafters of the legislation was the prevention of what was repeatedly referred to as "gross frauds".* These frauds were not, with the exception of misrepresentations concerning a *bona fide* intention to reside in the United States, deceptions concerning mental attitude of attachment, but rather disregard, frequently with the connivance of the court clerk, of procedural requirements and misrepresentations as to simple matters of fact, such as date of arrival, and identity. The Congress had to find a way of circumventing the politicians and their allies who had brought about the naturalization of aliens who were unable to comply with the simple conditions laid down in R. S. Section 2165.

Congress solved the problems with which it was confronted in this area in two ways, each of which throws light on the issue here in focus.

1. The Investigative and Litigated Character of the Naturalization Process Emphasizes the Propriety of Attaching Finality to the Judgment and Finding of Attachment.

Beginning with the Act of 1906 and continuing into the period here in issue, Congress engrafted onto the naturalization process a system of enforcement in order to prevent the evils of improper naturalization. In 1906, the heart of the system was the creation of an administrative agency to police the statute; the provision for a ninety-day waiting

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* The tale is familiar to the Court. See *Schneiderman* v. *United States*, 320 U. S. 118, 133, note 12, and *Bindczyck* v. *Finucane*, *supra*.

period;* and the provision in Section 11 for representation of the government's interest. See *Bindczyck* v. *Finucane, supra;* 40 Cong. Rec. 3643, 3645.

* See the testimony of Commissioner Hunt, *Hearings, supra,* p. 10, who stated that "the main point of this bill—what we may call our discovery—is the petition of naturalization." He went on to explain:

> "Heretofore there has been the declaration of intention made at any time, anywhere, without any previous inquiry, and we propose to abolish the declaration of intention and substitute for it a petition of naturalization made three months before the naturalization occurs and to be made in the same court in which the naturalization occurs, the petition to have all the salient facts set forth, not merely the ex parte statement of the applicant, but to have the facts he intends to prove before the court set forth in the petition. That petition will be made in duplicate and one copy is to be sent here to the Bureau of Naturalization.
>
> "Now, the Bureau of Naturalization, having this before it, knows that John Smith has applied for naturalization before such and such a court; that he will be examined for naturalization at such and such a time; that he came from such and such a place at such and such a time, and has resided at such and such places in the United States since coming here; so that the Government in Washington will be completely forearmed when John Smith comes before the court to be naturalized.
>
> "It will have time, even, to send abroad to find out whether the facts he states about his birth are true, and it can go into court then with full information to contest that naturalization if it chooses to do so; whereas now it gets no word of any naturalization at all, and under the previous bills looking to the reform of the naturalization laws it has been provided after the naturalization has been conferred the copies of the records and the report on it shall be sent to the Bureau of Naturalization. What is the use of that? It is too late. Now, if you get this petition, stating everything the man intends to show, three months before, then it is the Government's own fault if there are any frauds."

According to the chairman (*Hearings, supra,* p. 20) the purpose of the waiting period was "in order to enable the agents of the Bureau of Naturalization to make an investigation, so that they can present to the court any objections that may exist to the naturalization of a party."

Subsequent to the Act, the enforcement procedure was expanded and regularized. During the period of time relevant here, the applicant was subjected to the following course of investigation for purposes of verifying his qualifications and litigating them where necessary:

a. While still in the country of his origin, the applicant was required to obtain an immigration visa and a quota number from the American consul who could refuse it, if the alien was inadmissible or ineligible for citizenship. 8 U. S. C. Sec. 202; 43 Stat. 153; 43 Stat. 176.

b. After his arrival in the United States, the alien is again subject to examination by at least two immigration inspectors who have the power to subpoena witnesses, take evidence, administer oaths, and to refuse admission if the alien is inadmissible or ineligible for citizenship.*

c. Subsequent to his arrival, the alien is required to fill out in writing a "Statement of Facts and Preliminary Form for Declaration of Intention," a form secured from the office of the Immigration and Naturalization Service and filed with the service.**

d. The Immigration and Naturalization Service then attaches to the executed statement and preliminary form referred to in the preceding paragraph, the applicant's certificate of arrival, and forwards both to the clerk of the court where the applicant is to be naturalized. There-

* See Act of May 19, 1921, 42 Stat. 5, as amended May 11, 1922, 42 Stat. 540, as amended by Sec. 2 of the Immigration Act of 1924, 43 Stat. 153, 8 U. S. C., Sec. 202, and Act of February 5, 1917, Chapter 29, Section 16, 39 Stat. 885, 8 U. S. C., Sec. 152. Under these provisions the examination by the Consul and the Immigration Inspectors covered all of the alien's qualifications for citizenship, including such matters as whether or not he was an anarchist or a believer in organized government.

** See Rule 6, Naturalization Regulations of July 20, 1935, 8 C. F. R. 385.

after, the applicant executes a Declaration of Intention (Form No. 2202), in which he states under oath that he was not an anarchist nor a polygamist nor a believer in the practice of polygamy and that it was his intention in good faith to become a citizen of the United States and permanently reside here. This declaration is made in the office of the clerk.

e. Subsequent to the filing of the declaration of intention by a period of not less than two nor more than seven years, the applicant is required to execute another form which at various times in the period at issue was known either as an Application for a Certificate of Arrival and Preliminary Form for Petition for Citizenship (Form A-2214) which included a "Statement of Facts to be Used in Filing My Petition for Citizenship", or a consolidated version of these papers headed "Statement of Facts and Preliminary Form for Petition for Naturalization." See Naturalization Regulations of January 1, 1932, Rule 3, and compare Naturalization Regulations of July 20, 1935, Rule 6.

f. The above form is left with the Immigration and Naturalization Service for its investigation, and after completion of the investigation, the applicant is notified to appear with two witnesses before an Immigration and Naturalization Service examiner.*

g. Upon notice he appears with his witnesses to be examined under oath. The witnesses, each of whom must be a citizen of the United States, attest to the fact that the applicant is a person of good moral character and attached to the principles of the Constitution of the United States. If the examining authorities are satisfied on the basis of

* See Rule 7, subdivision A of the Naturalization Regulations of July 20, 1935.

their prior investigation and subsequent examination that the applicant possesses the necessary qualifications, a petition for citizenship is prepared in triplicate (Form No. 2204 LA) in which the applicant again states that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government; that he is not a polygamist; that he is attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. The attached affidavits of the two witnesses state their personal knowledge concerning the applicant's continuous prior residence in the United States, his good moral character, his attachment to the principles of the United States Constitution and his general qualifications for admission to citizenship.

h. This petition for citizenship, executed with the cooperation and approval of the Immigration and Naturalization Service, is filed by the applicant with the clerk of the court and both he and his witnesses are put under oath and sworn.

i. Subsequent to the filing of the petition, the applicant in certain instances, might again appear before a "designated" examiner, appointed by the court, for further examination under oath.*

j. If the designated examiner makes favorable findings, a conditional recommendation for citizenship is made and the applicant is notified to appear in court on 30 days' notice for final hearing. The notice may also state any objection the Service has to his naturalization and witnesses or facts that it desires to bring to the attention of

* The designated examiner system was initiated in 1926, see Act of June 8, 1926, 44 Stat. 709, 710, now Section 333 of Nationality Act of 1940.

the court. These issues are litigated before the court at the final hearing, which prior to the Nationality Act of 1940, took place no less than 90 days subsequent to the filing of the petition for citizenship.

k. Where the recommendation is favorable, at the final hearing a motion for admission of the applicant to citizenship is made by the representative of the Immigration and Naturalization Service upon the findings theretofore filed, and if the motion is granted, the oath of allegiance is taken, the order of naturalization is entered, and the certificate is issued by the clerk.

l. If the applicant is admitted over the objection of the government, or if it subsequently entertains doubts about his qualifications, it may appeal.

Prior to the statute, the naturalization trial was quite perfunctory. Indeed, in many instances it was a mere parody of a judicial trial. Yet no court ever found in this circumstance a reason for questioning the finality of the judgment. The elaborate mechanisms for verifying, contesting and litigating the claims of the applicant which were inaugurated by the statute supply special justification —if one were needed—for the application of the principle of *res judicata*.

2. The Addition to the Statute of "Illegal Procurement" as a Ground for Cancellation.

Congress not only endowed the naturalization process with a truly adversary character, but, as part of the statutory plan for a uniform system for prevention of improperly granted citizenship, deprived the naturalizing court of discretion in dealing with procedural matters (Section 4), the "manner" in which the alien complied

with the prescribed process.* And in harmony with this intention it made it possible to police judgments which had been issued in disregard of the basic procedures and thus "illegally procured" (Section 15).

This ground of cancellation is based upon the equitable remedy of error apparent on the face of the record, just as the relief for fraud was to be implemented by the equity bill of review procedure.**

But illegal procurement does not (and was not intended to) cover the same area as fraud. To view the former as the substitute for the latter minus false representation and scienter would violate not only the canon against redundancy in interpretation but would ignore the theretofore well-established and clearly understood distinction in equitable remedies between a bill of review for relief from extrinsic fraud and a bill for error apparent.***

The illegal procurement sanction was obviously intended to apply to disregard or omission of procedural matters, while the extrinsic fraud sanction alone could impeach a finding of attachment or belief. The former could be established objectively from the record of the proceeding itself, while the latter was addressed to matters outside the record.

The omission of procedural matters was not cured by the judgment because they were indispensable prerequisites to the exercise of the power to naturalize. But the essence of the judicial power, the area in which the judgmental

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* See the Commissioners' Report, *supra*, Appendix E, pp. 85-86, "Report of C.V.C. Van Deusen, Special Examiner of the Department of Justice on matters relative to Naturalization." "The conclusion is therefore inevitable that if fraud is to be successfully legislated against such legislation must include * * * a simple and comprehensive code of procedure * * * that will leave to the judges the least latitude consistent with the strict enforcement of the law."

** See 7 Moore, *Federal Practice*, Sec. 60.15.

*** See 7 Moore, *Federal Practice*, Sec. 60.24.

function is uniquely involved, is the determination of attachment and allegiance. It would truly create a "jurisprudence of labels" to insist that the conclusion which the court must ultimately reach by weighing evidence, resolving conflicts and assessing sufficiency, is a jurisdictional or a procedural prerequisite to its power to reach it.

Besides, on the very surface there is a qualitative difference between the relatively simple determinations which have been treated as impeachable for illegal procurement * and determinations of attachment and allegiance. For, these latter, as the Court well knows (see *Schneiderman* v. *United States, supra,* and *Baumgartner* v. *United States,* 322 U. S. 665) involve not only highly subjective elements but objective ones which cannot be resolved without profound regard for important public values, national traditions and constitutional limitations.

The denaturalization process itself is compounded of those matters which are procedural and transitory and those which are permanent and substantive. The underlying purpose of the former is to aid the court in reaching sound conclusions with respect to the latter—attachment, allegiance and good moral character. The identification of these latter findings with the judicial process enjoys a

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* Instances of those indispensable prerequisites to the naturalization process, the omission of which will give rise to an action in illegal procurement, are the requirement of filing of a certificate of arrival, *Maney* v. *United States,* 278 U. S. 17; *United States* v. *Ness,* 245 U. S. 319; the requirement of a hearing in open court, *United States* v. *Ginsberg,* 243 U. S. 472; the requirement that the witnesses be subjected to examination under oath, *United States* v. *Leles,* 227 Fed. 189 (D. C. Cal.); the requirement of Section 11 dealing with the right of the United States to call witnesses, *Milder* v. *United States,* 284 Fed. 571, 572 (C. A. 8); the requirement that the two verifying witnesses be United States citizens, *United States* v. *Martorana,* 171 Fed. 397 (C. A. 3); and the requirement of the renunciation by name, rather than generally, of a state or sovereignty of which the alien was a citizen or subject, *Ex parte Lange,* 197 Fed. 769 (D. C. Mo.).

genealogy as old as the Republic itself. See *Stark* v. *Chesapeake Insurance Co.*, 7 Cranch 420, and *Campbell* v. *Gordon*, *supra*. No design to obliterate this deeply-rooted distinction can be attributed to the framers of the Act—if for no other reason than that it would strip the judicial process, root and branch, of its distinctive function in this area and result in a violation of Article III of the Constitution.

E. The Post-Statutory Cases Confirm the Validity of Our Contentions.

What we have been saying with respect to the finality of the judgment of naturalization in its relationship to the findings of attachment, allegiance and good moral character is, we believe, fully supported by the Court's interpretation of the 1906 statute.

The first decision of the Court dealing with the doctrine of *res judicata* as it relates to naturalization is *Johannessen* v. *United States*, 225 U. S. 227. In that case the defendant admitted to the government in 1908 that in 1892 the testimony of his two witnesses in respect to his residence was perjured. The government brought a proceeding for his denaturalization, alleging that the certificate was illegally procured. The Court held that the original 1892 judgment did not bar the subsequent proceeding under the principle of *res judicata* on the ground that the naturalization proceeding in 1892 was not in reality a "judicial proceeding".

The Court then went on to state, "What may be the effect of a judgment allowing naturalization in a case where the government has appeared and litigated the matter does not now concern us." The Court pointed out that if a naturalization proceeding were not completely *ex parte*, then the principle of *res judicata* would apply. Mr. Justice Pitney developed this concept for the Court:

> "What we have to say relates to such a case as is presented by the present record, which is the ordinary

case of an alien appearing before one of the courts designated by law for the purpose, and, without notice to the government, and without opportunity, to say nothing of duty, on the part of the government to appear, submitting his application for naturalization with *ex parte* proofs in support thereof, and thus procuring a certificate of citizenship. In view of the great numbers of aliens thus applying at irregular times in the various courts of record of the several states and in the Federal circuit and district courts throughout the Union, and bringing their applications on to summary hearing without previous notice to the government of the United States or to the public, it is, of course, impossible that the public interests should be adequately represented, and in our opinion the sections quoted from the Revised Statutes are not open to any construction that would give a conclusive effect to such an investigation when conducted at the instance of and controlled by the interested individual alone.

"The foundation of the doctrine of *res judicata*, or estoppel by judgment, is that both parties have had their day in court 2 Black, Judgm. Sections 500, 504. The general principle was clearly expressed by Mr. Justice Harlan, speaking for this court in Southern P. R. Co. v. United States, 168 U. S. 1, 48, 42 L. Ed. 355, 377, 18 S. Ct. Rep. 18:

> 'That a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies.'

"Sound reason, as we think, constrains us to deny to a certificate of naturalization, procured *ex parte* in the ordinary way, any conclusive effect as against the public."

The impact of the Court's rationale in *Johannessen* upon the present case is emphasized by its discussion of

United States v. *Throckmorton*, 98 U. S. 61. The *Throckmorton* decision holds that issues of fact litigated in a patent proceeding were *res judicata* in a later proceeding even against a claim of fraud where the fraud was grounded upon the identical factual issues already litigated by the original court. Mr. Justice Pitney, in the *Johannessen* case distinguished the opinion in *Throckmorton* by once again stressing the *ex parte* character of the naturalization proceeding in effect in 1892:

> "United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93, is not opposed in principle, for as pointed out in United States v. Minor, 114 U. S. 233, 241, 29 L. Ed. 110, 113, 5 S. Ct. Rep. 836, the patent was issued on the confirmation of a Mexican grant after judicial proceedings, where there were pleadings and parties, and witnesses were examined on both sides, with the right to appeal. Vance v. Burbank, 101 U. S. 514, 519, 25 L. Ed. 929, 931, was likewise a contested case in the Land Department, as the report shows.
>
> "The doctrine that a patent issued *ex parte* may be annulled for fraud has been repeatedly applied to patents for inventions. United States v. American Bell Teleph. Co., 128 U. S. 315, 361, 32 L. Ed. 450, 459, 9 Sup. Ct. Rep. 90; American Bell Teleph. Co., 167 U. S. 224, 238, 42 L. Ed. 144, 153, 17 Sup. Ct. Rep. 809."

Mr. Justice Pitney concluded by emphasizing the *ex parte* character of the proceedings for naturalization then before the Court:

> "The act does not purport to deprive a litigant of the fruits of a successful controversy in the courts; for, as already shown, the proceedings for naturalization are not in any proper sense adversary proceedings, but are *ex parte* and conducted by the applicant for his own benefit."

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IN THE

Supreme Court of the United States

October Term, 1957

No. 72

STANISLAW NOWAK,

Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF FOR THIRTY-TWO NATURALIZED CITIZENS *AMICI CURIAE*

Interest of *Amici Curiae*

This brief, the filing of which has been consented to in writing by both parties, is submitted on behalf of thirty-two individuals, all of whom are the subject of denaturalization proceedings which are in various stages of litigation ranging from complaint to appeal. We believe that certain issues presented by this case are importantly involved in the proceedings pending against the *amici curiae*. These issues are (1) the extent to which a naturalization decree is *res judicata* of the issues therein determined; (2) the kind of allegations necessary to support an affidavit of good cause under Section 15 of the Act of June 29, 1906, and (3) the impact of the First Amendment's guarantee of free speech, press and assembly upon denaturalization proceedings.

Summary of Argument

This proceeding is typical of a large number of proceedings filed against naturalized citizens upon the theory that at the time of naturalization they had a relationship to the Communist Party which made their representations concerning allegiance and attachment knowingly false. The theory of the government rests upon simple fraud *inter partes* and not upon the kind of extrinsic fraud which alone can serve to impeach a judgment. Thus, if the government's theory is wrong, its entire case must fall because all of the separate representations upon which the government relies are merged in the ultimate finding of allegiance and attachment which, we contend, cannot be reexamined because it is concluded by the principle of *res judicata*.

I

The Naturalization Act of 1906 which governs this proceeding and those in which the *amici* are involved contains unanswerable indications that the universal principle of finality of judgments was to be respected.

The silence of Congress, in the face of the well established nature of the principle of finality (*Tutun* v. *United States*, 270 U. S. 568), imposes upon the government a strong burden of explaining how a special exception was made of a universal rule. The decision to commit naturalization to the judicial process, the constitutional questions which would be raised by a contrary conclusion, the frustration of the purpose of uniformity, and the insistence upon a requirement of an affidavit of good cause, all support our contention that finality was intended.

This contention is reenforced by the legislative history of the statute which shows that while a separate proposal for reexamining preexisting judgments was rejected, the fraud provisions of Section 15 were to be governed by principles of law then obtaining.

These principles proclaim that a judgment of naturalization could not be attacked or revoked after the lapse of the term without a showing in an affidavit of good cause of extrinsic fraud.

In order to prevent the improprieties at which the statute was directed, it provided for an elaborate course of investigation, verification and adversary litigation. These provisions supply special justification for the application of the principle of *res judicata*, for they establish the litigated character of the findings in issue. The important statutory purpose of uniformity of application was further implemented by depriving the naturalization court of discretion to waive important procedural matters and adding illegal procurement as a sanction for policing the judgment.

But this sanction applies to an altogether different area than fraud. Borrowed from the equity bill for error apparent on the face of the record, it was designed to deal with those procedural matters which had been improperly waived or disregarded by the court. It is manifestly not a sanction which will permit reexamination of findings of attachment and good moral character which peculiarly involve the exercise of the judicial process and with which, since the beginning of the Republic, they have been uniquely identified.

The decisions of the Court from *Johannessen* to *Knauer* support our contention that whether the cause of action be termed legal procurement or fraud, *res judicata* prevents a reexamination of findings of attachment and good moral character since they have been litigated.

II

Important considerations drawn from the domain of due process, as well as the First Amendment, make special demands for the finality of findings dealing with attachment and belief. See *United States* v. *Minerich*, C. A. 7,

No. 12005, decided December 5, 1957. This Court has warned, both in the denaturalization area as well as elsewhere, about the dangers of construing statutes retroactively so as to penalize conduct lawful at the time it was engaged in. Communists are not an excluded group under the Act. The legislative history shows that Congress did not intend, during the periods of time here in issue, to make membership in the Communist Party relevant to naturalization. And the Naturalization Service itself has never so construed the statute.

The only question specifically dealing with organizational affiliations of the kind relevant here is Question 28 in the preliminary form of petition. This deals with all forms of anarchy alone and not with communism. The fact that nowhere in its manifold forms and regulations does the Service make communism relevant to naturalization is clear evidence that the government is now retroactively injecting a new ground into the naturalization process. This contention is supported not only by the negative evidence of the silence of the Service, but by the fact that there is a deep cleft between anarchy and communism, and that at least during all times relevant here, membership in the Communist Party could be treated merely as evidence of political unorthodoxy, but little more. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 244.

Not only does abandonment of finality thus introduce a serious due process question into the administration of the statute, but it impairs the political freedom of the naturalized citizen. The retroactive application of the statute, when coupled with the government's insistence that lapse of time is irrelevant to its right to relief, converts the whole denaturalization process into a form of purge, activated whenever it suits the government's convenience. This allows the government to use the denaturalization process to pick off those naturalized citizens whose activ-

ities are offensive to it and imposes upon all naturalized persons the inevitable self-censorship which comes with the knowledge that such activities may lead to the destruction of a lifetime's achievements.

The disregard of the passage of time, moreover, creates insuperable difficulties for the individual seeking to defend his attachment and allegiance. While the government has the ever ready aid of professional witnesses and informers who will swear to anything, the defendant is confronted with insurmountable difficulties in his own preparation. His original witnesses may be dead or intimidated into silence, and apart from this, the issues, normally treacherous and difficult of proof, become insuperably so after the lapse of a long time period. In short, the government's delay increases the likelihood of error in the new trial to the point where equity should not grant relief.

III

The affidavit of good cause is totally defective in that it lacks all of the allegations which it was intended should be set forth by the government to show that good cause in fact exists for setting aside the judgment. These include extrinsic fraud, the fact that the plaintiff did not really know the facts and was therefore deceived, and the manner in which he was injured by the misrepresentation. The affidavit also lacks averments as to the time when the alleged fraud was discovered and subsidiary allegations of prompt recourse. The omission of the latter allegations alone would make the affidavit insufficient.

The Theory of the Denaturalization Proceedings Involved Here

The denaturalization proceedings in which *amici curiae* are involved are unified by the same theory which grounds this proceeding. The government claims that an alleged concealment by the applicant for naturalization of his membership in the Communist Party vitiates the judgment of naturalization and requires cancellation of the naturalization certificate on the ground of fraud and illegal procurement. Specifically, it is claimed that the applicant's relationship to the Communist Party with knowledge of its allegedly subversive purposes resulted in knowingly false representations and undertakings by the applicant in the following respects:

> (a) That he fully believed in the form of government of the United States; that he did not belong to and was not associated with any organization which teaches or advocates the overthrow of existing government in this country.
>
> (b) That he was not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government; that he was attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States; and that he would renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty of which he was a subject.
>
> (c) That he would support and defend the Constitution and laws of the United States of America against all enemies foreign and domestic; that he would bear true faith and allegiance to the same; and that he took this obligation without any mental reservation or purpose of evasion.

The representations set forth in (a) above are in response to Questions Nos. 23 and 28 * of a document called Preliminary Form for Petition for Citizenship which the applicant for citizenship is required to fill out, before he is permitted to file his Petition for Citizenship. The latter document contains the representations set forth in (b) above,** while the undertakings set forth in (c) are drawn from the oath which the applicant takes at the conclusion of the naturalization proceeding.

In this case petitioner was naturalized under the Act of 1906. Because of this fact and because a large number of the *amici curiae* were naturalized under it, we confine our discussion to this statute. In this case, the district court refused to find that petitioner had been specifically asked whether he was a member of the Communist Party. In most, if not all, of the complaints filed against the *amici curiae*, there is no allegation that the applicant was specifically asked orally whether or not he was a member of the Communist Party. This brief therefore confines itself to the government's case as typically pleaded.

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* Question 23 reads as follows: "Do you fully believe in the form of government of the United States?" Question 28 is in two parts: "Are you a believer in anarchy?", followed by "Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country?"

** Attached to the petition are also affidavits of two witnesses to the effect that to their personal knowledge the applicant during his residence in the United States has been "a person of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States."

I

Findings by a Naturalization Court of Attachment to the Principles of the Constitution and Good Moral Character Are *Res Judicata*

If, as we contend, the findings by the naturalization court in this case of attachment to the principles of the Constitution and good moral character are subject to reexamination for only those reasons which would justify an attack upon the finality of a judgment in any other case, then the decision below must be reversed. This is so because:

(1) All of the requirements relating to belief in the form of government of the United States, membership in an organization advocating the overthrow of existing government in this country and the promise to renounce fidelity or allegiance to a foreign prince or sovereignty are merged in the judgment of naturalization and finding of attachment to the principles of the Constitution.*

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* The district court in this case apparently made no finding that the oath was false. Hence we do not discuss in this brief the extent to which it is protected by the judgment. See *Knauer* v. *United States*, 328 U. S. 654. We think it important to point out that the oath is administered only after the court is satisfied that the applicant is qualified. The fact that the oath was administered raises without more the presumption that the court "before whom the oath was taken, was satisfied as to the character of the applicant." *Campbell* v. *Gordon*, 6 Cranch 176, 182. Obviously, an attack on the falsity of the naturalization oath cannot serve to circumvent the finality of the finding of attachment and must be based upon some extraordinary showing of conduct subsequent to the taking of the oath of a kind outside the realm of constitutional protection which would make its falsity demonstrably clear. Compare Chafee, *Free Speech and the United States* (1941), p. 373.

(2) The fraud alleged and proved by the government in this case is inadequate to destroy the finality of the judgment and finding.*

A. Section 15 of the Act of 1906 Was Not Intended to Destroy the Finality of Judgments of Naturalization.

No one questions the fact that the certificate of naturalization rests upon a judgment which, like every other judgment, is the product of the judicial process and is subject to appeal. *Tutun* v. *United States*, 270 U. S. 568. Yet in order to prevail in this case, the government must establish that Section 15 of the Act of 1906 was framed to establish a special exception to the universal principle of finality of judgments. We believe this contention to be wholly without merit and that all of the available guides overwhelmingly establish that Section 15 of the statute must be construed and applied within the framework of the doctrine of *res judicata*. We deal here with the considerations which project from the surface of the statute, indicating that there was no intention to abandon the established principle that matters which were litigated in the naturalization proceeding were not to be subjected to reexamination except for the reasons which would operate to reopen any judgment.

At the outset, it must be emphasized that there is not a syllable in the language of the statute which supports a rejection of *res judicata*. Affirmatively, the statute commits naturalization to the judicial process where it had lodged for over 110 years previously. The legislative history is fertile with reassurances by the sponsors of the legislation that there was no intention to depart from the basic principles which had taken root in this area. Thus,

* We discuss below the contention that the representations complained of do not give rise to a charge of the kind of fraud which will vitiate a judgment.

the final report of the House Committee which considered the bills (H. Rep. No. 1789, 59th Cong., 1st Sess., 1906) stated (at p. 3):

> "Your committee has not sought to make any radical changes in the principles of existing law * * *."

See also 40 Cong. Rec. 3646, 7874.

In *Tutun*, this Court held that appellate review was so ingrained a part of American justice that it was not to be "assumed that Congress denied the right of appeal merely because it did not affirmatively confer it." *Bindczyck* v. *Finucane*, 342 U. S. 76, 87.* Certainly *res judicata* is no less ingrained in our system of justice.**

Moreover, we must see the problem against a setting of its institutional environment and history. Naturalization was historically entrusted to the courts not merely because it was convenient to do so, but because it was deemed more appropriate in a democracy to stabilize naturalization through the safeguards of the judicial process. This was a decision of a fundamental kind by which the young Republic sought to reject the arbitrary exercise of power through the royal prerogative, and subjected it to the rule of law.*** The framers of the statute did not intend to tamper with this long established distribution of power by stripping its exercise of perhaps its most basic attribute, finality.

If the government's contention is to prevail in this case that a judgment of attachment may be reexamined

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* And it must be borne in mind that the bills from which the statute ultimately emerged contained affirmative proposals for judicial review.

** We show in a later section that *res judicata* was deeply ingrained in the naturalization process prior to 1906.

*** It will be recalled that one of the grounds of the Declaration of Independence was that the Crown had in arbitrary ways obstructed "The Laws for Naturalization of Foreigners".

and set aside on grounds other than those which traditionally vitiate judgments, this Court must decide that Congress intended, under Section 15 of the Act of 1906, to attach to the exercise of the judicial power, under Article III of the Constitution, authority to re-examine a judgment after it has become final, by exhaustion of the appellate process or by failure to invoke it. Congress, a body largely dominated by lawyers, was fully aware of the constitutional problems which would be created by legislation exposing the finality of judgments to attack. Indeed, they were specifically told that the courts had held that naturalization judgments were final. See *infra*. Why should language be strained, common sense ignored, firmly established traditions uprooted, and a constitutional conflict invited by attributing to Congress an intention to permit the re-examination of the judgment of attachment on the basis of a kind of fraud which had theretofore been deemed inadequate to vitiate a judgment?

The dominating theme of the statute and its legislative history is the insurance of the uniformity and integrity of the naturalization process. These ends were to be achieved by a system of procedural prerequisites designed to prevent improperly granted citizenship through reducing the risk of error and deception in the judicial finding of the ultimate facts of attachment and good moral character. The purpose was to deal with fraud prior to the judgment, not afterward, to police the judgment by prevention rather than by overleaping the then existing modes for reopening a judgment on the ground of fraud. Congress certainly did not intend on the one hand to make naturalization uniform, stable and relatively free from the exercise of discretion, but to make the denaturalizing process arbitrary and capricious by ignoring the stability of judgments and placing each naturalized citizen, until the time of his death, at the mercy of an elastic and undefined system of denaturalization in which judgments theretofore final would become volatile and conditional.

Finally, the requirement in Section 15 of an affidavit of good cause is hardly a routine requirement for the initiation of an action; it typically suggests the showing which had to be made in order to overcome the inertia of a judgment. See, for example, *Craig* v. *Smith*, 100 U. S. 226, and compare *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, 248.

B. The Legislative History Reflects Congressional Concern for the Stability of the Naturalization Judgment.

The legislative history of the statute supplies an additional reason for concluding that its framers had no intention of eliminating the principle of *res judicata* in relation to naturalization decrees. President Roosevelt's Commission of 1905 * produced a majority and minority bill. The majority bill (H. R. 9964) was drafted by Commissioners Purdy and Campbell, and the minority bill by Commissioner Hunt. Both bills contained provisions for the cancellation of certificates of citizenship.

The majority bill provided in addition, in Section 33, for an elaborate procedure under which certificates of citizenship issued prior to the effective date of the proposed statute were to be registered. This provision made it the duty of holders of pre-statutory certificates to present to the clerk of the court the certificate through which they claimed citizenship, for registration by the clerk. Wherever the certificate was valid on its face, and the clerk had no reason to believe "that the certificate was obtained through fraud or in illegal manner," the clerk was to fill out a form, describing and identifying the holder of the certificate, to be signed by such holder. A duplicate description of the applicant was then to be filled out by the clerk and signed by the applicant, certified by the clerk, and returned to the Bureau of Naturalization.

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* See *Bindczyck* v. *Finucane*, *supra*.

At the hearings,* one of the witnesses, R. P. Morle, the clerk of the United States District Court for the Eastern District of New York, commenting on Section 33, pointed out (at p. 14) that a naturalization decree was a judgment, and citing *Spratt* v. *Spratt*, 4 Pet. 393, stated: "I do not see from the decision of the Supreme Court how a legislative body can set aside a judicial court judgment." Similarly, another witness attacked the proposal on the ground that *Spratt* v. *Spratt* had held that a naturalization judgment was "complete evidence of its own validity." After the proposal was objected to by one of the members of the Committee, Congressman Adams, on the ground that it would be "an impairment of contract", and by another, Congressman Wood, who asked "should not the thing under the seal of the court be accepted as the best evidence" (Hearings, p. 49), it was dropped. And on the floor of the House, during the final debate on the bill, Congressman Bonynge, the manager of the bill, assured Congress that the companion provision for cancellation of the naturalization judgment was declaratory of then existing law (40 Cong. Rec. 7874). We turn now to a consideration of the law relating to the finality of naturalization judgments prior to the Act of 1906.

C. The Pre-Statutory Decisions Dealing With Naturalization Judgments.

An analysis of the federal and state cases dealing with the character of the naturalization judgment prior to the Act of 1906 establishes the following:

1. *Naturalization operates only through the exercise of the judicial process and results in a judgment.* See *Spratt* v. *Spratt*, *supra*; *Campbell* v. *Gordon*, *supra*; *United States* v. *Gleason*, 78 Fed. 396 (C. C. N. Y. 1897),

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* 59th Cong., 1st Sess. Hearings before the House Committee on Immigration and Naturalization on the Bills to Establish a Bureau of Naturalization and to provide for a Uniform Rule for the Naturalization of Aliens Throughout the United States.

The effect of the *Johannessen* opinion upon the present proceedings is clear. The naturalization process embodied in the 1906 statute under which present petitioner was naturalized is, of course, in no sense an *ex parte* proceeding. In *Johannessen* Mr. Justice Pitney pointed out that the proceedings were "without notice to the government," that they were "without opportunity, to say nothing of duty, on the part of the government to appear," and that therefore it was "impossible that the public interest should be adequately represented" in investigations "conducted at the instance of and controlled by the interested individual alone."

The naturalization proceeding in effect at the time of petitioner's naturalization was a proceeding, as the Court has pointed out, in which a decree was "entered after an opportunity to be heard." Moreover, "notice of the filing of the naturalization petition was required to be given ninety days before the petition was acted on"; "the hearing on the petition was to take place in open court"; "the United States had the right to appear, to cross-examine petitioner and his witnesses, to introduce evidence and to oppose the petition." Moreover, the government "had the right to appeal from the decision granting naturalization." *Schneiderman* v. *United States*, *supra*, at 123. This proceeding, therefore, was precisely the reverse of the *ex parte* proceeding described in the *Johannessen* case. Applying the rule laid down in *Johannessen*, this naturalization proceeding is one in which the doctrine of *res judicata* has full play.

The next decision of the Court to touch upon the principle of *res judicata* was *United States* v. *Ness*, 245 U. S. 319. In this case the government sought to denaturalize an individual who obtained a decree of naturalization without an attached certificate of arrival. The issue before the Court was whether the original decision in a state court

on the adequacy of the naturalization certificate was *res judicata* as to the denaturalization proceeding. The Court by Mr. Justice Brandeis held that while a decision on "competency or weight of evidence or the credibility of witnesses" is conclusive against the United States, the doctrine of *res judicata* is not applicable to illegality in procurement involving the total absence of a jurisdictional prerequisite such as lack of a certificate of arrival, since the government had no direct review of a naturalization judgment entered in a state court.

The limited character of this holding relating to a judgment in a state court was emphasized by Justice Brandeis in a later opinion in *Tutun* v. *United States*, 270 U. S. 568. In the *Tutun* case the Court faced the question whether there was an appeal from a naturalization judgment in a federal court. In holding that an appeal lay from the naturalization judgment of a federal district court, Mr. Justice Brandeis distinguished his opinion in *Ness* by pointing out that there "the question under discussion was whether a judgment of naturalization entered by a state court barred as *res judicata* a proceeding brought in a federal court under Section 15 to cancel the certificate of naturalization."

The combined impact of the *Johannessen*, *Ness* and *Tutun* cases upon the applicability of *res judicata* in a denaturalization proceeding is clear. If a naturalization proceeding is not *ex parte* and if appellate review is available to the government from the original judgment, the normal principles of *res judicata* must be applied. Since the present naturalization proceedings are *not ex parte*, and since a judgment of a federal court in a naturalization proceeding is appealable, the normal rules of *res judicata* apply and findings of fact such as attachment to the

Constitution and allegiance to the country may not be relitigated.*

The next decision of the Court to advert to the principles of *res judicata* is *Schneiderman* v. *United States*, *supra*; where a judgment for the plaintiff in a denaturalization proceeding was reversed. While the petitioner had raised "the nature and scope of the government's right in a denaturalization proceeding to re-examine a finding and judgment of attachment upon a charge of illegal procurement," the Court specifically did not reach this question and left it unanswered, holding that in any event the Government had failed under the applicable rules of evidence to prove lack of attachment. The Court left open the question "whether under the Act of 1906 as it was in 1927 the Government * * * can secure a *de novo* re-examination of a naturalization court's finding and judgment that an applicant for citizenship was attached to the principles of the Constitution," stating that "we do not consider these questions" (at 123-124).**

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* There is no contradiction of this principle in the holding of the Court in *Maney* v. *United States*, 278 U. S. 17. In this case a naturalization judgment was entered without the necessary certificate of arrival. The district court permitted it to be filed *nunc pro tunc*. The Court upheld a petition for denaturalization on the ground of illegal procurement, stating that the judgment attacked did not make the matter *res judicata* since the judgment on its face revealed that the court below had no jurisdiction to grant citizenship. Hence this was not a situation in which relitigation of findings of fact was prohibited. It was a conventional voiding of a judgment invalid on its face.

** Although the majority opinion in *Schneiderman* did not reach the question of *res judicata* because of its disposition of the case on the ground of failure to present clear and convincing proof, it indicated in Footnote 3 (at 124) that a decree of naturalization "even though the United States does not appear, cannot be compared (as was done in *Johannessen* v. *United States*, 225 U. S. 227, 238) to an administrative grant of land or of letters patent for invention, and that the permissible area of re-examination is different in the two situations."

In his concurring opinion in *Schneiderman*, Mr. Justice Douglas pointed out that the finding by the district court that the applicant has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same, is "the condition precedent" to naturalization," not the weight of the evidence underlying the finding" (at 162-163). Mr. Justice Douglas concluded therefore that a finding of attachment cannot be set aside by a re-examination or relitigation of that finding in a subsequent proceeding. Mr. Justice Douglas went on to explain the importance of applying the principle of *res judicata* to findings of attachment in naturalization judgments (at 165):

> "If findings of attachment which underly certificates may be set aside years later on the evidence, then the citizenship of those whose political faiths become unpopular with the passage of time becomes vulnerable. It is one thing to agree that Congress could take that step if it chose. See Turner v. Williams, 194 U. S. 279, 24 S. Ct. 719, 48 L. Ed. 979. But where it has not done so in plain words, we should be loath to imply that Congress sanctioned a procedure which in absence of fraud permitted a man's citizenship to be attacked years after the grant because of his political beliefs, social philosophy, or economic theories. We should not tread so close to the domain of freedom of conscience without an explicit mandate from those who specify the conditions on which citizenship is granted to or withheld from aliens. At least when two interpretations of the Naturalization Act are possible we should choose the one which is the more hospitable to that ideal for which American citizenship itself stands."

The opinion of the Court in *Baumgartner* v. *United States*, *supra*, on the question of the applicability of the principle of *res judicata* to naturalization judgments is very similar to that of the majority in *Schneiderman*. As in *Schneiderman*, the Court did not reach the effect of the principle of *res judicata* since it found that in any event the government did not sustain the high burden of proof required in denaturalization proceedings.

The most recent opinion of the Court adverting to this problem is *Knauer* v. *United States*, 328 U. S. 654. In this case the government sought to denaturalize the defendant on the ground of fraud in the naturalization oath. The defendant urged that the issue of fraud in the oath was *res judicata* in the judgment sought to be set aside. In disposing of this question adversely to the defendant, the Court, by Mr. Justice Douglas, once again specifically pointed out that it was not ruling on "the extent to which a decree of naturalization may constitute a final determination of issues of fact, the establishment of which Congress has made conditions precedent to naturalization." However, the rationale adopted by the Court completely supports our contention that litigated findings of fact are *res judicata* against subsequent attack. The Court pointed out (at 670-671):

> "An analogy is sought to be drawn to those cases where relief against a prior judgment, on the ground that perjured testimony was introduced at the trial, was denied. United States v. Throckmorton, 98 U. S. 61, 66, 25 L. Ed. 93. And see Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399, 421, 43 S. Ct. 458, 464, 67 L. Ed. 719. But that rule goes no further than to say that the issue of fraud can become res judicata in the judgment sought to be set aside. We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact, the establishment of which Congress has made conditions precedent to naturalization. Those facts relate to the past—to behavior and conduct. But the oath is in a different category. It relates to a state of mind and is a promise of future conduct. It is the final act by which an alien acquires the status of citizen. It requires foreswearing of allegiance in good faith and with no mental reservations. The oath being the final step, no evidence is heard at that time. It comes after the matters in issue have been resolved in favor of the applicant to citizenship. Hence, no opportunity ex-

> ists for the examiner or the judge to determine if what the new citizen swore was true, was in fact false. Hence, the issue of fraud in the oath cannot become res judicata in the decree sought to be set aside. For fraud in the oath was not in issue in the proceedings and neither was adjudicated nor could have been adjudicated."

The application of the Court's rationale in *Knauer* to the present case is clear. Here the government seeks to relitigate findings relating "to the past—to behavior and conduct." These are findings of fact involving the taking of evidence. These are findings of fact arrived at after an opportunity for "the examiner or the judge to determine if what the new citizen swore was true, was in fact false." These are findings of fact which have been adjudicated in a prior proceeding. Under the rationale of the *Knauer* case, these findings of fact are *res judicata* against subsequent attack.

The doctrine of *res judicata* has likewise been applied by the lower courts. See *United States* v. *Bischof*, 48 F. 2d 538 (C. A. 2, 1931) affirming *United States* v. *Bischof*, 35 F. 2d 186 (D. C. N. Y. 1929); *United States* v. *Pandit*, 15 F. 2d 285 (C. A. 9), cert. denied 273 U. S. 759; *United States* v. *Kusche*, 56 F. Supp. 201 (D. C. Cal. 1944).

All these cases conclusively establish that both in a cause of action for illegal procurement and a cause of action for fraud the test of the application of the doctrine of *res judicata* is whether the facts upon which the conclusion rests have been litigated. Where these issues of fact have been litigated they cannot be reopened in a subsequent proceeding, whether the proceeding be designated one in illegal procurement or one in fraud. Here the only "fraud" charged is alleged false statements underlying

the very findings of fact which the government seeks to relitigate. The issue as to whether these findings are true or false is foreclosed and cannot be reopened in the absence of extrinsic fraud.*

II

Important policy considerations require the finality of the naturalization judgment.

The conventional reasons for finality (*Hart Steel Co.* v. *Railroad Supply Co.*, 244 U. S. 294, 297; *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1) apply with great force to the naturalization judgment. There are due process reasons as well why findings of attachment cannot be re-examined. In addition, the First Amendment makes special demands for the finality of findings dealing with political belief and association. See *United States* v. *Minerich*, No. 12005, decided December 5, 1957 (C. A. 7).

A. The Denial of Finality Creates Serious Constitutional Problems.

The Court has held with respect to the Act of 1906 that "the Act makes nothing fraudulent or unlawful that was honest and lawful when it was done." *Johannessen* v. *United States*, supra, and *Luria* v. *United States*, 231 U. S. 9. And, of course, this assurance was necessary to re-

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* We think it also quite clear that the principle of *res judicata* protects against attack on the ground of illegal procurement, omissions, deviations and deficiencies in the naturalization process which cannot fairly be deemed to be "jurisdictional". See the cases cited in *United States* v. *Kusche*, *supra*, at 210, 214, and the opinion of Judge Hand in *In re Denny*, 240 Fed. 845, 846.

solve the serious constitutional question which would arise if the statute retroactively penalized conduct lawful at the time of naturalization. Compare *United States* v. *Beebe*, 180 U. S. 343; *State of Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 How. 421; *United States* v. *Klein*, 13 Wall. 128; *United States* v. *Padelford*, 9 Wall. 531.

The foundation of the charge against petitioner (and against the *amici curiae*) is membership in the Communist Party. The Government does not (and could not) contend that Communists were an excluded group such as anarchists or polygamists (Section 7). However, an alleged relationship to the Communist Party is now claimed to be sufficient to reopen and relitigate the original finding of attachment.

Petitioner has demonstrated at length that the whole course of legislative history in this area shows that Congress did not intend during the periods of time here in issue to make membership in the Communst Party relevant to naturalization. As the Court of Appeals for the Seventh Circuit has recently held in *United States* v. *Minerich, supra*:

> "Regardless of what government witnesses Malkin, Note, Gitlow and Wright described from the witness stand as the communist objective during 1925 to 1928, Congressional disapproval of affiliation with that party remained legislatively inarticulate until recent years and the record before us is silent on the point. But all we mean is that there is no legalistic way, this late in the day, by which we can fairly decide if there was such concealment by Minerich in 1928 warranting 1957 revocation of his citizenship."

It need only be observed here that the many and detailed forms and questionnaires which the applicant was required

to sign did not ask whether he was a Communist. See *supra.**

The only question which specifically probes political beliefs and affiliations deemed relevant to naturalization is Question 28 in the Preliminary Form of Petition. The attempt, years later, to convert Question 28 into one which an alleged Communist could not truthfully answer in the negative is strained and incredible. The purport and scope of the entire question is established by the initial query as to whether the applicant is a believer in anarchy. The question which succeeds it does not advance into a new

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* In *United States* v. *Matles*, No. 13121, a denaturalization case in the Eastern District of New York, Reuben Speiser, a veteran employee of the Immigration and Naturalization Service in the Office of General Counsel, a former naturalization examiner and author of the "Speiser affidavit" of good cause, gave the following testimony about communism as a bar to naturalization (at pp. 2413-2414):

"Q. Sir, in 1934,—in August of 1934—was there any rule, regulation or enunciated policy contained in writing of the Immigration and Naturalization Service of the Department of Labor that one may not be admitted to citizenship by reason of membership in the Communist Party?

* * *

Mr. Gliedman: As a departmental policy, you say?

"Mr. Perlin: Written departmental policy, regulation, or statute applicable to it.

"The Witness: May I answer?

"The Court: Yes.

"The Witness: I do not recall any official document which specifically mentioned the Communist Party as an organization in 1934, to which an applicant for naturalization is prohibited from belonging.

"Q. And that is to the best of your present recollection? A. Yes."

As far as we have been able to discover, there are no official documents of any kind, during the entire period here in issue, which make the applicant's relationship to the Communist Party relevant to his qualifications for citizenship.

area but rather particularizes the basic question concerning anarchy. It thus asks about the applicant's relationship to any organization teaching anarchy or the overthrow of existing government in this country. Manifestly, the introductory part of this second question deals with anarchy as a political or philosophical theory, while the second portion refers to the terrorist version of anarchy, the "propaganda of the deed" for the purpose of permanently ending the rule of the state. This question thus did not ask alternatively about anarchy and communism, but exhaustively about all forms of anarchy alone.

What the language of the statute and legislative history establish, the administrative application and enforcement confirm. And it is hardly surprising that the statute was interpreted by the Service through its forms of interrogation to be confined to anarchists. For the distinction between Communists and anarchists is long-established and deeply-rooted.*

"The internal history of the International Workingmen's Association is the history of this struggle between Proudhonism and the modern Socialism of Marx," the Marxist publicist Plekhanov wrote in 1894.** Following the struggle to overcome the influence of the individualistic anarchism of Proudhon, Marx in the early seventies attacked more and more violently the anarchist wing represented by Bakunin, who, while approving common ownership of land and other means of production, advocated not only the conquest but the destruction of the state. Bakunin

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* We do not discuss here whether the Service would have been authorized to make communism a basis for denying naturalization, in view of the fact that Congress had not done so. (When the statute was passed the Communist Party was not even born in the United States.) Our more limited point is that the Service did not so interpret the statute.

** G. V. Plekhanov, *Anarchism and Socialism*, (tr. Eleanor Marx Aveling; Charles H. Kerr & Co., Chicago, 1907), p. 78.

in turn polemicized against the authoritarian "German Communism." The climax of the conflict was the expulsion of Bakunin from the International Workingmen's Association in 1872. After its Congress of Paris in 1889, the reorganized International carried on a bitter struggle against the anarchist movement. Anarchist organizations and publications were suppressed by the Soviet Government after the Revolution.*

Expressing the violent antipathy of Communists toward the anarchist movement, Plekhanov wrote:

> "The Anarchists are Utopians. Their point of view has nothing in common with that of modern scientific Socialism." **

On his part, Bakunin in 1869 vigorously rejected the suggestion that he was a Communist:

> "Because I demand the economic and social equalization of classes and individuals, because * * * I have declared myself in favor of collective property, I have been reproached with being a Communist. What difference, I have been asked, is there between communism and collectivism. * * * I detest communism, because it is the negation of liberty, and I cannot conceive anything human without liberty. I am not a Communist, because communism concentrates and causes all the forces of society to be absorbed by the State, because it necessarily ends in the centralization of property in the hands of the State, while I desire the abolition of the State—the radical extirpation of this principle of the authority and the tutelage of the State, which, under the pretext of moralizing and civilizing men, has until now, enslaved, oppressed, exploited, and depraved them." ***

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* Oscar Jaszi, *Anarchism*, 2 *Encyclopedia of the Social Sciences* 46-53 (1953 ed.).

** Plekhanov, *op cit.*, p. 127.

*** Quoted in Plekhanov, *op. cit.*, pp. 80-81.

The "collectivist" anarchism of Bakunin frankly advocated the necessity of violence to destroy the existing order. His successors, such as Prince Kropotkin and Johann Most, argued that terrorist actions—propaganda of the deed—were important to arouse the imagination of the passive masses. The non-violent, individualistic anarchists taught non-cooperation with the state, refusal to pay taxes, and to perform military service, in order that the system might collapse.*

In this country anarchism was defined by Emma Goldman as "the philosophy of a new social order based on liberty unrestrained by man-made law; the theory that all forms of government rest on violence, and are therefore wrong and harmful, as well as unnecessary."** The reference to "overthrow of existing government in this country" thus probed into a cardinal anarchist canon, the termination of all state power—a proposition which, it need hardly be stated, is anathema to Communists. Compare *United States* v. *Minerich, supra.*

While the Service now vociferously insists that the ends and aims of the Communist Party make a relationship to it relevant to the issue of attachment, it cannot explain why it did not—either in its forms or in its extensive regulations—say so. The answer, of course, is that this discovery is an afterthought fertilized by a changed political climate.

The Court in *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 244, held that membership in the Communist Party during the period here in issue could be treated as evidence of political unorthodoxy, but little more. And

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* Jaszi, *op. cit.* See also, Paul H. Douglas, "Proletarian Political Theory", in *A History of Political Theories, Recent Times* (Charles E. Merriam & Harry E. Barnes, eds., The Macmillan Co., N. Y., 1924).

** Quoted in Charles A. Madison, *Anarchism in the United States*, 6 J. of the History of Ideas 46, 62 (1945).

this conclusion is overwhelmingly supported by all available studies. Thus Professor Almond found that the Communist Party's identification with such desirable social and political goals as racial and ethnic equality, economic and social equality, freedom from oppression, pacifism and internationalism, and the Party's approach to trade union and minority group problems, were the most common motives for joining.* He concluded that "The general run of working-class respondents viewed the Party in terms of working-class interests, rather than in terms of the Party's aims."** Another survey likewise found that "The Communist * * * usually * * * thinks of himself as an idealist joining the party because of his hatred of war, poverty, and discrimination or other injustice." ***

These factors played a particularly potent role in the 1930's. As the capitalistic system faltered and the stock market crash lengthened into the great depression, which by 1932 threw almost a quarter of the nation's labor force into unemployment,† the radical economic solution offered by the Communist Party exerted a magnetism that is difficult to comprehend in more prosperous times. The Communist Party manifested itself to the public as a supporter of unemployment compensation, relief, social insurance, industrial unionism, and as an opponent to the incipient fascist threat. The depression also resulted in a change of American attitudes towards the Soviet Union, culminating in the establishment of diplomatic relations, which in turn reflected a degree of prestige on the American Communist Party. In the words of one economic historian:

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* Gabriel A. Almond, *The Appeals of Communism* (1954), pp. 238-240. See, also, Telford Taylor, *Grand Inquest* (1955), pp. 155-159.

** *Ibid.*, p. 392.

*** Morris L. Ernst and David Loth, *Report on the American Communist* (1952), p. 4.

† *Statistical Abstract of the United States* (1956), p. 197.

> "As the nation sank into deep, prolonged depression, and the Soviet Union prospered and experienced a chronic shortage of workers, the political attitude of the greatest capitalist nation toward collectivist Russia became distinctly more favorable. The need for securing Soviet orders hushed business anathemas and altered general economic opinion." *

The Communist Party appeared, moreover, as a lawful political party with candidates on the ballot in most states.** Something of the political climate and intellectual ferment of the period is indicated by the fact that the Communist presidential ticket in 1932 was supported by a League of Professional Groups which included among its members H. W. L. Dana, John Dos Passos, Sidney Hook, Frederick L. Schuman, Sherwood Anderson, Erskine Caldwell, Malcolm Cowley, Waldo Frank, Matthew Josephson, and Edmund Wilson.***

Thus proceedings of this sort—under the guise of relitigating attachment—apply the statute retroactively, in the sense that they introduce elements into the denaturalization process which were no bar to naturalization at the time. This would be improper for due process reasons—wholly apart from the fact that political rights are involved. The threats which such retroactive application poses to political freedom add a special dimension to the problem.

This Court has warned against converting the denaturalization process into a "ready instrument for political persecution." *Knauer* v. *United States, supra; Schneiderman*

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* Broadus Mitchell, *Depression Decade* (1947), p. 293.

** In 1936, for example, the Communist presidential nominee was on the ballot in thirty-five states. *Statistical Abstract of the United States* (1937), p. 159.

*** 75th Cong., 3d Sess., Special Committee on Un-American Activities, House of Representatives, Hearings, *Investigation of Un-American Propaganda Activities in the United States*, Vol. I (1938), pp. 379-380.

v. *United States*, *supra*, at 164.* It is hard to conceive a more compelling indication of extrinsic motivation than the government's attempt to make Communist Party membership retroactively relevant for the qualifications for naturalization.**

The elimination of finality inevitably sows among our foreign-born citizens the fear that for all of their lives they must exercise their political liberties with an eye on the Immigration and Naturalization Service. Though full-fledged citizens in name, they in fact remain political wards of the Department of Justice.

When the government's disregard of the finality of the naturalization judgment and its readiness to improvise and

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* In *Meyer* v. *United States*, 141 F. 2d. 825 (C. A. 5, 1944), Chief Judge Hutcheson commented that this Court had

> "authoritatively rejected the views acted on by some but by no means all of the inferior federal judges and never by the Supreme Court; that naturalized, unlike native born, citizens remain indefinitely under judicial tutelage; that because they are naturalized instead of native born citizens their thoughts and speech are subject to a jealous surveillance, so that in effect their citizenship is held by a tenure no stronger than their ability from time to time to satisfy government inquisitors and judges that their views are, according to accepted formulae, safe and sound."

Judge Hutcheson went on to remind that:

> "United States District Attorneys and United States judges are not given surveillance or inquisitorial powers or suzerainty over the souls and minds of foreign born citizens; and that citizenship once granted him, a naturalized citizen has the same freedom in thinking and speaking as a native born citizen has."

See, also, *Orth* v. *United States*, 142 F. 2d 969 (C. A. 4, 1944), and *United States* v. *Kuhn*, 51 F. Supp. 400 (D. C. Pa., 1943).

** The pleadings in the cases of the *amici curiae* and in this case do not enlighten us as to whether or not the government had knowledge at the time of naturalization of the defendant's alleged Communist Party membership; nor do they tell us when the government discovered the alleged misrepresentation. See *infra*. For all that appears, it may have known about it all along. Compare *United States* v. *Anastasio*, 226 F. 2d 912 (C. A. 3).

retroactively impose new political qualifications are coupled with its insistence that lapse of time and lack of due diligence in seeking relief are no defense against denaturalization (see *infra*), it becomes painfully apparent that the whole denaturalization process has really been eliminated from the rule of law. See *United States v. Anastasio, supra.* Thus it becomes possible—if not inevitable—that the targets of denaturalization will be those whose differences with the administration in power make their harassment politically lucrative. Denaturalization becomes a means not of curing fraud, but of punishing dissent * beginning with those who are active in politically unorthodox movements and widening in scope to engulf trade union leaders, until it finally reaches little people who invite reprisal because of their refusal to renounce their political beliefs, to act as informers or otherwise to "cooperate" with the Department of Justice. ** Not to put too fine a point on it—denaturalizations of the kind involved here are purges masquerading as legal proceedings.***

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* This selective process under which particular individuals are singled out for denaturalization because they are deemed to be presently subversive converts what is in form an action for the rescission of a status into a criminal trial for subversion.

** We have never encountered a case of an attempted denaturalization of a renegade or recanted communist. Consider Maurice Malkin, an ex-Communist who is employed as a professional witness by the Immigration and Naturalization Service. Malkin, in the course of his many appearances on the witness stand, has admitted that he lied in his application for naturalization. Yet, as far as we know, no proceeding has ever been instituted to denaturalize him.

*** The Government can hardly dispute this. On June 18, 1956, Senator James O. Eastland, chairman of the Senate Internal Security Subcommittee, wrote to the Department of Justice demanding the prompt denaturalization and deportation of four labor leaders—all of them *amici curiae* here. The Department replied on June 26 that "the Department of Justice has been vigorously pursuing proceedings designed to denaturalize and deport any naturalized citizen whose presence in the United States may constitute a threat to internal security." (Department of Justice Press Release, June 27, 1956.)

The abandonment of finality is poisonous to political liberty because it results in censorship of political expression and invites discrimination in the enforcement of the denaturalization statute on political grounds *—a counterpart of the very evil which the statute was framed to prevent.

B. Relitigation of Findings of Attachment Creates Insuperable Difficulties and Hardships for a Defendant.

Petitioner came to this country in 1913 at the age of ten. He became a naturalized citizen in 1938. The denaturalization complaint was filed at the close of 1952. As the Appendix shows, those on whose behalf this brief is filed have lived in this country for periods of time ranging from thirty to more than fifty years. In a great many instances they arrived here in their infancy with no conscious attachment to any other land or sovereign. On an average, a generation has elapsed since they obtained their certificates of citizenship. They have married here and raised families, whose members have acquired derivative citizenship. Parents and children have served in the armed forces. The structure of their lives is bound together by the fact of citizenship and the judgment which granted it.

What is involved is not denaturalization alone, for the cancellation proceeding is but a precurser to deportation. These individuals are thus threatened with the possible uprooting of their lives because the commitment to citizenship upon which they had staked all is now, years later, claimed to be compromised by perjury and fraud. This claim must be rejected by a court of equity because, though not asked to choose between their political views and their

* See, for example, *Stromberg* v. *California*, 283 U. S. 359, 369; *Herndon* v. *Lowry*, 301 U. S. 242, 258; *Winters* v. *New York*, 337 U. S. 507, 518-519; *Near* v. *Minnesota*, 283 U. S. 697, 712; *Thornhill* v. *Alabama*, 310 U. S. 88, 100-101.

aspiration for citizenship, they are now, in their declining years, with diminished earning power and long-parted ties to other lands, being penalized for having chosen wrongly. And even if they were in fact asked to choose and chose wrongly, can it be doubted that the possible loss to the naturalized citizen because of the changes in his personal life is far greater today than it would have been had the government acted promptly? By delaying its remedy until a time when its success would result in a loss to the defendant far greater than it would have been had the government pursued its remedy with dispatch, the government forfeits its right to equitable relief. See *Restatement of Judgments*, Section 129 and *Comments*.

Added to these hardships created by the passage of time are the difficulties of relitigating the defendant's attachment and allegance. Consider the relative position of the parties when the government comes to court. In almost all of these cases the government relies upon testimony of professional witnesses who are employed by the Immigration and Naturalization Service. These witnesses boast memories which, like wine and cheese, improve with age. They fly backward in time with the greatest of ease to remember that a particular defendant addressed a Communist official as "Comrade" on a morning in May thirty years ago; or that another defendant confided to him the most blood-thirsty determination to overthrow the government at the very time in 1938 that he was applying for naturalization.

These same witnesses are testimonial maids of all work. They also function as experts to testify that the Communist Party intended to overthrow the government by force and violence during the years in issue—whatever they may happen to be, and that the Marxist-Leninist books which the government introduces in evidence were required reading for all, including the defendant, so that he must have known of the subversive goals of the organization.

How is such a witness to be cross-examined? And how is the defendant to prepare his defense case? There is a great likelihood that in many instances his own two witnesses who vouched for him are either dead or intimidated into silence. Since they themselves are likely to be naturalized citizens, it is difficult to ask them to risk their own citizenship by coming again to the defense of the loyalty of the individual now subject to denaturalization. If the witnesses are alive and available to take the stand, they lack the government witnesses' mnemonic skills and are too honest to "remember" facts concerning the applicant's political views and affiliations long ago.

And how is the applicant himself to prove his attachment to the principles of the Constitution? The difficulties of proving in a contemporaneous proceeding a proposition so subjective* are multiplied by the burden which requires a witness to prove that twenty or thirty years ago he told the truth when he swore that he was attached to the principles of the Constitution. How to bring to life after a generation a dream that was spacious enough to embrace both adherence to democratic ideals and a belief in socialism; both the longing for a better world, borne of a hatred of the injustice and exploitation which the alien carried with him from his native country, and the belief in the institutions of democracy? How can he explain that the phrase "attachment to the principles of the Constitution" was not a formula of rigid content sanctifying the *status quo* against which he could check point by point his own beliefs and commitments, but rather a broad assurance of democracy and freedom embracing divergent viewpoints? Where is he to find the night school teachers who, in collaboration with the Immigration and Naturalization Service, prepared him for citizenship and explained to

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* Cf. *United States* v. *Lattimore*, 215 F. 2d 847 (App. D. C.), and see *Schneiderman* v. *United States*, *supra*. Compare *Schwimmer* v. *United States*, 279 U. S. 644, with *Girouard* v. *United States*, 328 U. S. 61.

him what the Constitution meant and how it differs in theory and in substance from the oppressive laws which had driven him to find a new home? Where is he to find the examiner who took him step by step through the naturalization process? *

Finally, where is the advocate resourceful enough to undertake a task, beyond the skill and competence of most historians, to portray an era not as it appeared to those who came after it, but as it was felt and lived by those who were a part of it? How to convert into evidence those subtle and imponderable factors which make a political philosophy acceptable in one period of history and anathema in another? ** And how to essay the even more difficult task of demonstrating to a court through witnesses the impact of that era upon his own consciousness and convictions?

One would be blind to reality to deny that the government's unexplained delay in pursuing its remedy has so

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* As Judge Hand pointed out long ago in *In re Denny*, 240 Fed. 845, 846, applicants for citizenship are "a defenseless class of persons necessarily left to the guidance of officials, except in so far as the courts may mitigate the rigors of their interpretation."

** In reversing the district court's cancellation order on December 5, 1957 in the case of Anthony Minerich, one of the *amici* herein, the Court of Appeals for the Seventh Circuit had the following to say concerning the political hindsight which is involved in these matters:

> "Though communism is now recognized as an enemy ideology, contemporary recognition finally became crystallized in official circles of our government at a comparatively late date."

It added:

> "A political decision here based on hindsight would infect the judicial processes of our free society faster than tolerating retention of a probably undeserved privilege of citizenship * * *."

increased the likelihood of error * as to require the withholding of relief. Nor is it an answer to any of our contentions to assure the defendant in a case of this sort that the government must carry a weighty burden of proof. The evils of which we complain flow from the usurpation of the power to impeach a judgment. Nothing short of restoring the naturalization judgment itself to the rule of law will cure them.

III

The "Speiser affidavit" is not an affidavit of good cause.

Petitioner's brief discusses in detail the "procedural" aspects of the affidavit of good cause: ** the extent to which it fails to conform to proper evidentiary standards and the lack of specificity of the allegations set forth therein. We confine ourselves here, therefore, to the contention that certain indispensable allegations are omitted altogether.

It need not be extensively argued that the requirement of an affidavit of good cause is specifically imposed upon the denaturalization proceeding as an indispensable "prerequisite" (*United States* v. *Zucca*, 351 U. S. 91) to the commencement of the proceeding. Because the cancellation process involves an attack upon a judgment, Congress required that the supporting averments duplicate those attached to (or sometimes embodied in) the bill of review in equity for relief against a judgment after the lapse of the term. See *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, 248.

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* See *Restatement of Judgments, Comments* on Section 129(b).

** There is involved here the so-called "Speiser affidavit", similar in form and authorship to those attached to the denaturalization complaints issued against the *amici*.

But the "Speiser affidavit" assumes that no judgment is involved and disregards all of the established requirements imposed by equity for impeaching a judgment out of term on the ground of fraud. A brief glance at the affidavit will readily reveal that, despite the intention of Congress to the contrary, the government views this proceeding as no different from any action in fraud where no judgment is involved. This becomes quite clear when we compare the complaint and the affidavit. To all material intents and purposes they are indistinguishable from one another.

But such an affidavit literally is not an affidavit of good cause, for it expresses no good cause why the judgment should be reopened. We must note at the outset that we are in an area in which pleading requirements are strict and precise. See *Wood* v. *Carpenter,* 101 U. S. 135, 140; *United States* v. *Stinson,* 197 U. S. 200; 7 Moore, *Federal Practice,* Section 60.37 [1]. More than this, the affidavit of good cause in a denaturalization proceeding is a Cerberus which guards citizenship with a jealous vigilance. See *United States* v. *Zucca, supra.* An affidavit seeking relief from a judgment of naturalization must contain:

(1) A statement of the judgment sought to be impeached or a summary of it. *Dexter* v. *Arnold,* Fed. Cas. No. 3856, 5 Mason 303.

(2) Allegations charging something more than misrepresentation or perjury. The "acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered." *United States* v. *Throckmorton, supra,* at 65; *Restatement of Judgments,* Section 118; 2 Pomeroy, *Equitable Remedies* (1905), Secs. 648-649; *Freeman on Judgments* (5th ed., 1925), Sec. 204.

(3) An allegation that the plaintiff did not know the facts involved in the misrepresentation and was therefore deceived. See *United States* v. *Anastasio, supra,* at 917, and cases cited in footnote 14, and *United States* v. *Salomon,* 231 Fed. 929 (C. A. 5).

(4) The precise way in which the plaintiff was injured by the misrepresentation, *i.e.,* how the outcome would have been different had the misrepresentation not been made. *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399, 421-422.

(5) "Especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is, so that the Court may clearly see whether, by ordinary diligence, the discovery might not have been before made." Quoted in *Wood* v. *Carpenter, supra,* at 140. See also *Restatement of Judgments,* Section 129(b).

The affidavit here in issue lacks all of these allegations demanded by equity as evidence of good cause for the impeachment of a judgment. These allegations cannot be waived;* the affidavit is totally defective.**

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* Indeed, even if the fraud allegations were adequate, the silence of the affidavit with respect to time factors, due diligence and prompt judicial recourse after discovery, would alone condemn it. See *Restatement of Judgments,* Sections 118 and 129.

** As we have seen, the Court has heretofore treated as "jurisdictional" in some constructive sense omissions by the applicant for naturalization of a far less basic character. See, for example, *United States* v. *Ness, supra.* The failure of the government to make the allegations which we have discussed is, we believe, more clearly jurisdictional in the true sense, for the court has no power to reopen the judgment without them and its power to act upon the original proceeding has long since lapsed. It cannot be the law that technical defects and procedural irregularities in the naturalization proceeding are jurisdictional, while the disregard of allegations of good cause in the denaturalization affidavit is not.

CONCLUSION

Established principles of equity, as well as basic constitutional rights of free speech and thought, require that the complaint be dismissed.

Respectfully submitted,

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Celia Feller Miller
Anthony Minerich
Steve Nelson
Paul Novick
Gunnar Paulson
Clara Paulson
Sol Almazov Pearl
Constantine Radzie
Alex Roth Rakosi
Al Richmond
Isaac E. Ronch
Allan Ross
James E. Toback
Louis Weinstock

APPENDIX

Name	Birth Date	Year of Arrival in U. S.	Year of Naturalization	Children
Isidore Begun	1903	1904	1925	0
Daniel Boano	1905	1911	1945	0
Louis J. Braverman	1900	1914	1931	0
Arthur Bartl	1912	1930	1944	4
Joseph Chandler	1906	1923	1943	4
Charles A. Collins	1906	1924	1939	2
Richard Lawrence Davis	1911	1927	1944	1
Anna Devunich	1908	1927	1944	0
Stephen Devunich	1899	1927	1942	0
Freeda Diamond		1910	1943	2
David Diamond	1892	1910	1943	2
Sarah Finkel	1896	1906	1944	2
Leo Fisher	1897	1903	1945	0
Max Hatturg	1896	1927	1935	3
Victor Jeremy Jerome	1896	1915	1928	3
James Lustig	1902	1921	1928	1
Salvatore Lauranti	1903	1906	1941	8
James J. Matles	1909	1929	1934	1
Celia Feller Miller	1900	1913	1944	1
Anthony Minerich	1903	1905	1928	
Steve Nelson	1903	1920	1928	2
Paul Novick	1891	1920	1927	1
Gunnar Paulson	1899	1922	1944	0
Clara Paulson	1898	1907	1945	0
Sol Almazov Pearl	1895	1922	1944	0
Constantine Radzie	1896	1913	1939	0
Alex Roth Rakosi	1907	1923	1940	2
Al Richmond	1913	1915	1943	2
Isaac E. Ronch	1897	1913	1935	1
Allan Ross	1907	1922	1940	3
James E. Toback	1901	1906	1944	0
Louis Weinstock	1903	1924	1930	2